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Supreme Court of the United States

OCTOBER TERM, 1959.

No. 938

CHILEAN NITRATE AND IODINE SALES CORPORATION,

Petitioner,

against

AMICIZIA SOCIETA NAVEGAZIONE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT AMICIZIA SOCIETA NAVEGAZIONE, IN OPPOSITION.

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Opinions.

The opinion of the District Court for the Southern District of New York is unofficially reported at 1960 American Maritime Cases 624 and is also contained on pages 50a to 54a of the Petitioner's brief in the Court of Appeals.*

The unanimous opinion of the Court of Appeals (Clark, C. J.) is reported at 274 F. 2nd 805.

* As in the Petition, citations to the Appendix of Petitioner's Court of Appeals brief are to numbers suffixed with the letter "a." Citations to the record in the District Court are to numbers prefixed with the letter "R."

Jurisdiction.

The judgment of the Court of Appeals was entered on January 16, 1960. Petition for Writ of Certiorari was filed on May 14, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Question Presented for Review.

Simply stated, the question is

Whether a party (a) who demands an arbitration pursuant to an arbitration clause in a Charter Party under which the parties were performing and (b) who elects to claim for damages for breach of a Charter Party and (c) who participates in the arbitration, may subsequently claim that the said Charters are void for a want of the meeting of the minds of the parties on the very issue submitted to the arbitrators.

Statement.

In September, 1956, two vessels, then under construction, namely the *Giorgio Parodi* and the SS *Donatella Parodi*, were chartered for five years by the Petitioner (here called Charterers) from the Respondent (here called Owner) (7a). The Charter Parties contained an arbitration provision that "any" dispute between the parties should be referred to three arbitrators in New York. The decision of any two arbitrators to be "final" (11a).

In December, 1956, after a complete inspection and survey by the Charterers, the first of the two vessels, the SS *Giorgio Parodi*, was delivered to the Charterers (48a). Six months later, after continuous use by the Charterers, a belated protest as to the rigging at the hatches was made (17a).

Notwithstanding knowledge of this alleged defect, the Charterers in August, 1957, accepted delivery of the second vessel, the SS. *Donatella Parodi*, without protest or exception (17a). Both vessels were then and are now in Charterers' service. Not until March of 1958 did the Charterers demand arbitration, alleging that the Charter Party requirement of double rigged meant each hatch must have four booms and four winches. Owners maintained that the vessel with two winches and two booms fulfilled the requirement of the Charter Party (14a).

Arbitration was demanded by the Charterers and their attorney drew up the submission agreement wherein it was stated:

> "1. Under the subject Charter Party, does hatch equipment, consisting of two winches and two booms, satisfy the Charter Party term that the hatch be 'double-rigged?' "
>
> "2. If the answer to Question No. 1 is in the negative, what damages, if any, is Charterer entitled to under the facts concerning the delivery and operation of the vessel under the subject Charter Party?" (7a, 14a).

At no time was it ever suggested to the arbitrators nor to any Court that the contracts were void.

After many hearings, the arbitrators found in Owners' favor on the submitted issue No. 1 and, therefore, there was no need to consider issue No. 2 (15a-18a).

The Decision in the District Court.

The Owners moved in the District Court for an order confirming the arbitration award which motion came on for hearing on April 23, 1960. Immediately before the motion was to be heard, the attorneys for the Charterers

served the attorneys for the Owners with a Notice of Motion dated the same date seeking to vacate the award for a mistake of law (5a). In a supporting affidavit, Charterers also moved in the alternative that the Charters be declared void for failure of the parties' minds to meet.*

This was the first time the Charterers raised the latter point. Quite apart from the fact that the point had not been timely raised, Owners' counsel made no comment on this theory because it was felt that it did not require a response since the sole authority upon which it was based had been overruled by legislative enactment.

The District Court found no support in the law for vacating the award for a mistake of law. The meeting of the minds theory was firmly rejected on the ground that, after a contract has been performed or executed, it cannot be claimed there was no contract (50a-54a).

The Decision of the Court of Appeals.

The Court of Appeals unanimously affirmed the District Court order noting that the theory which the Charterers labelled a mistake of law was a question of fact. In any event, if there was a misapplication of law (which the Court doubted), the same did not rise to the stature of a manifest disregard of the law.

The Court struck down the alternative argument as to meeting of the minds on the grounds that:

> 1. there was no contention as to the failure of the meeting of the minds in respect to the Arbitration Clause. Therefore, since the Clause was separate and

* Parenthetically, it may be noted that the Clerk of the Court at first refused to accept the cross-motion since it was not timely filed pursuant to Rule 9b of the Rules of the District Court. However, the District Judge permitted the filing.

provides for unrestricted submission (any dispute), the issue as to the meeting of the minds regarding "double-rigged" was for the arbitrators.

2. Even if there were a defect in the Arbitration Clause (which Charterers have never contended), the defect would have been cured by the voluntary submission to and the participation in the arbitration.

Argument.

This petition represents the final grasp at the proverbial straw by the Charterers and constitutes the fourth attempt to seek a favorable determination of a matter which they had previously agreed was to be finally settled with the arbitrators' decision. The various arguments of the Charterers have been successively rejected by (1) the majority of the arbitrators, (2) the District Court and (3) a unanimous Court of Appeals.

Charterers now come to this Court with their belated argument that since both parties may have had a different concept as to double rigging, there was no meeting of the minds, and, consequently, the Charter Parties are void. But it was precisely this clash as to meaning which precipitated the arbitration proceedings.

Needless to say, after every judicial or semi-judicial proceeding a disgruntled party will urge that there was no meeting of the minds as indicated by the decision of either a court or arbitrators. But if this were so, all arbitration proceedings would be worthless.

Notwithstanding the fact that the vessels have been and still are in Charterers' service and despite the fact that the Charterers demanded arbitration seeking only money damages (not that the contracts be voided) alleging disagreement as to the meaning of a single term, Charterers now

argue the very issue submitted to the arbitrators constitutes the basis for a declaration by this Court that the contracts are void.

In support of this proposition, Charterers cite *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 2 Cir. 126 Fed. 978, and *Finsilver Still & Moss* v. *Goldberg Mass & Co.*, 253 N. Y. 382, 171 N. E. 579.

There is nothing in the facts of the *Kulukundis* case which remotely resembles those now before the Court. Furthermore, Charterers' alleged prior reliance on it is to be seriously doubted since it was not cited in either their brief in the District Court nor in their main brief to the Court of Appeals.

In the *Finsilver* case, it was held that one who stays out of arbitration proceedings and maintains his position as to the non-existence of the contract can raise an issue as to the non-existence of the contract on a motion to confirm an arbitration award. Again, there is no resemblance on the facts of that case to this matter since there was no participation in the arbitration proceeding by the party claiming no contract.

Charterers faintly suggest that had this matter been determined according to the law of New York, a different result might have been reached.

This reasoning is difficult to understand in view of the amendments to the New York Arbitration Act enacted in 1937 (seven years after *Finsilver*). The law in New York now specifically precludes one who participates in the arbitration proceedings from raising an issue as to the validity of the contract (New York Civil Practice Act Section 1458).

This legislation limits a party who desires to litigate the issue as to the validity of a contract to a motion before arbitration and if he does not do this his participation in the arbitration proceeding is to be deemed a waiver.

In fact, since the *Finsilver* case (*supra*), the New York Courts have specifically pointed out that *Finsilver* is no longer the law and that under present law, participation in either the selection of the arbitrator or in any of the arbitration proceedings estops the raising of the jurisdictional issue as to the making of the contract providing for arbitration. Consequently, a party maintaining such jurisdictional issue can only do so by moving to stay the arbitration and having such issue disposed of *first* by the Courts.*

Here, Charterers were well aware, as witness the arbitration agreement, that each side held a difference of opinion as to a phrase in the Charter. If they were serious in their contention that the Charters were void, they should have moved the Court before arbitration. The very same Charterers who now assert there was no meeting of the minds did, however, initiate the arbitration proceedings and elected to claim damages (not that the contracts were void).

The statements in the Petition that the Owners acquiesced in the Charterers' request that the Courts determine the validity of the contract is sheer nonsense. Owners did not cover the point in the District Court because it was not raised until the very day of the motion. Similarly, Owners did not consider it worthy of reply since it was premised upon a case which had been overruled.

In a final attempt to prolong this seemingly interminable litigation, Charterers suggest that this case be set for hearing with the case of *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 2 Cir. 1959, 271 F. 2d 402, cert. granted 80 Sup. Ct. 682 (1960) (No. 659). This last-ditch attempt to hang on to the *Lawrence* case should not be countenanced.

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* *Harris* v. *East India Trading Co.*, 16 Misc. 2d 87, 144 N. Y. Supp. 2d 894.

None of the reasons which were present in the *Lawrence* case exist here. Even if this Court were to reverse *Lawrence in toto*, the Charterers' theory would still be indefensible.

Little comment need be made as to Charterers' theory of a manifest disregard of law. The Charterers contend that the arbitrators committed a mistake of law in not applying the legal principle that a contract is to be enforced according to the meaning given to it by one of the parties when the other party knew or should have known the first party's meaning. Thus, Charterers argue Owners knew or should have known Charterers' meaning of double rigged. As was pointed out by the Court of Appeals in their decision, there was no finding by the arbitrators that Owners knew or should have known Charterers' meaning. The decision is clear that Charterers never communicated their meaning to the Owners. This mistake in Charterers' theory was pointed out by the Court of Appeals which also stated that even if it be assumed that this were a mistake of law, it does not rise to the rank of a manifest disregard of the law. The Owners believe that the cases cited by the Court of Appeals are sufficient authority that arbitration awards are not vacated for mistakes of law.

Charterers charge that the Courts are unduly lenient in affirming arbitration awards and should reverse arbitral findings with which they are not in accord. Suffice it to say, that such functions should be reserved for appropriate action by the Congress. The Arbitration Act clearly sets forth the grounds for vacating an arbitration award, 9 U. S. C. 10, 11.

This is a simple, routine matter not involving any principles affecting new or novel, undetermined issues of law. There is no clash of authority nor any constitutional issue involved. In short, there is not cited one single factor which would justify review.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the writ of certiorari be denied.

Respectfully submitted,

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